Mohd Amar bin Mohamed v Attorney General, Malaysia & Anor

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW APPLICATION NO BA-25–73–12 OF 2023
SHAHNAZ SULAIMAN J
11 NOVEMBER 2024

Civil Procedure — Judicial review — Application for leave — Application for leave to commence judicial review against decision of Attorney General/public prosecutor in applying for discharge amounting to acquittal of the accused — Discretion of Attorney General under art 145(3) of Federal Constitution and s 254 of Criminal Procedure Code — Two-step threshold test developed in Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209 — Whether there was compelling prima facie evidence to allow application for leave of judicial review to be heard at substantive stage — Whether decision was made irrationally or unreasonably — Criminal Procedure Code s 254 — Federal Constitution art 145(3) — Rules of Court 2012 O 53 r 1 — Sexual Offences Against Children Act 2017 s 14(a)

The applicant had lodged a police report against his brother-in-law ('the second respondent') on allegation of sexual assault on the applicant's daughter. In response, the second respondent lodged a police report denying such allegation. The second respondent was then charged under s 14(a) of the Sexual Offences Against Children Act 2017 (Act 792). Nonetheless, during the case management, the deputy public prosecutor applied for acquittal and discharge of the second respondent. The sessions court judge granted the application, hence, the applicant filed the present application for leave to commence judicial review proceedings ('encl 1') under O 53 r 1 of the Rules of Court 2012 against the decision of the Attorney General ('the AG/the first respondent') in applying for a 'discharge amounting to an acquittal' of the second respondent pursuant to art 145(3) of the Federal Constitution and s 254 of the Criminal Procedure Code ('the impugned decision'). The AG objected the application on the grounds that the impugned decision was not amenable to judicial review. In determining the present case, the court had referred to the Federal Court case of *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209. In the said case, the Federal Court had developed a two-step threshold test that must be met at the leave stage for any application challenging the strong presumption of legality in the public prosecutor's discretion under art 145(3) of the Federal Constitution. The two-step threshold test required applicants to demonstrate, at the leave stage, that: (a) they had a legal basis to challenge the AG/public prosecutor's decision, grounded in traditional judicial review principles or precedents; and (b) they

could present compelling, prima facie evidence that the decision or omission fell within these grounds, leading to an inevitable conclusion that the challenge was justified. Therefore, the sole issue for the court's determination in the present case was whether there was compelling prima facie evidence at present to allow encl 1 to be heard at the substantive stage.

Held, dismissing the application to commence judicial review with no order as to costs:

(1) The fact that the second respondent was charged in the sessions court did not prevent the first respondent (the AG/public prosecutor) from exercising prosecutorial discretion, as sub-s 254(1) of the Criminal Procedure Code allowed discontinuation of proceedings (*nolle prosequi*) at any stage before judgment. Since judgment was not yet delivered, the first respondent was within his discretion to seek a discharge amounting to acquittal. Although the applicant argued that the first respondent exceeded his powers, they did not specify how or provide compelling prima facie evidence to support this claim (see para 39).

(2) The applicant's argument that the impugned decision violated public prosecutor's Direction No 2 of 2019 ('the direction') was unfounded and lacked merit because the direction did not categorically prevent the first respondent from applying for a discharge amounting to acquittal (see paras 39–40).

(3) There was no requirement under the law which impose any legal duty on the first respondent to give any reason in allowing and/or rejecting the representation made by the second respondent. There was nothing before the court to suggest that the first respondent had improperly considered the second respondent's representation. In the court's considered view, there was nothing in the application to form compelling prima facie evidence that the first respondent had acted in contravention of the direction, or any law for that matter, so as to overcome the strong presumption of legality in his making of the impugned decision (see paras 41–43).

(4) For the aforementioned reasons, the court found that there was no clear evidence in the applicant's affidavit showing that the decision was made irrationally or unreasonably. Therefore, the court was satisfied that the necessary legal threshold to challenge the impugned decision had not been met (see para 44).

[Bahasa Malaysia summary

Pemohon telah membuat laporan polis terhadap adik iparnya ('responden kedua') atas dakwaan melakukan serangan seksual terhadap anak perempuan pemohon. Sebagai tindak balas, responden kedua membuat laporan polis menafikan dakwaan tersebut. Responden kedua kemudiannya dituduh di

bawah s 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792). Namun begitu, semasa pengurusan kes, timbalan pendakwa raya memohon pembebasan dan pelepasan responden kedua. Hakim mahkamah sesyen membenarkan permohonan tersebut, justeru, pemohon memfailkan permohonan semasa untuk kebenaran bagi memulakan prosiding semakan kehakiman ('lampiran 1') di bawah A 53 k 1 Kaedah-Kaedah Mahkamah 2012 terhadap keputusan Peguam Negara ('AG/responden pertama') dalam memohon 'pelepasan berjumlah kepada pembebasan' responden kedua berdasarkan perkara 145(3) Perlembagaan Persekutuan dan s 254 Kanun Tatacara Jenayah ('keputusan yang disangkal tersebut'). Peguam Negara membantah permohonan tersebut atas alasan bahawa keputusan yang disangkal tersebut tidak boleh disemak melalui semakan kehakiman. Dalam menentukan kes semasa, mahkamah telah merujuk kepada kes Mahkamah Persekutuan iaitu *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209. Dalam kes tersebut, Mahkamah Persekutuan telah membangunkan ujian ambang dua langkah yang harus dipenuhi pada peringkat kebenaran bagi mana-mana permohonan yang mencabar anggapan kuat keabsahan di dalam budi bicara pendakwa raya di bawah perkara 145(3) Perlembagaan Persekutuan. Ujian ambang dua langkah tersebut memerlukan pemohon untuk menunjukkan, pada peringkat kebenaran, bahawa: (a) mereka mempunyai asas undang-undang untuk mencabar keputusan Peguam Negara/pendakwa raya, berdasarkan prinsip atau preseden semakan kehakiman tradisional; dan (b) mereka boleh mengemukakan keterangan prima facie yang meyakinkan bahawa keputusan atau peninggalan termasuk dalam alasan-alasan ini, yang membawa kepada kesimpulan yang tidak dapat dielakkan bahawa cabaran tersebut adalah wajar. Oleh itu, satu-satunya isu untuk penentuan mahkamah dalam kes semasa ialah sama ada terdapat keterangan prima facie yang kukuh pada masa ini untuk membolehkan lampiran 1 didengar pada peringkat substantif.

Diputuskan, menolak permohonan untuk memulakan semakan kehakiman tanpa perintah berkaitan kos:

(1) Hakikat bahawa responden kedua dituduh di mahkamah sesyen tidak menghalang responden pertama (AG/pendakwa raya) daripada menggunakan budi bicara pendakwaan, kerana sub-s 254(1) Kanun Tatacara Jenayah membenarkan pemberhentian prosiding (*nolle prosequi*) pada mana-mana peringkat sebelum penghakiman. Memandangkan penghakiman belum disampaikan, responden pertama berada dalam budi bicaranya untuk mendapatkan pelepasan yang berjumlah kepada pembebasan. Walaupun pemohon berhujah bahawa responden pertama melebihi kuasanya, mereka tidak menyatakan cara atau menyediakan keterangan prima facie yang meyakinkan untuk menyokong tuntutan ini (lihat perenggan 39).

(2) Hujah pemohon bahawa keputusan yang disangkal tersebut melanggar

Arahan Pendakwa Raya No 2 Tahun 2019 ('arahan tersebut') adalah tidak berasas dan tidak mempunyai merit kerana arahan tersebut tidak secara mutlak menghalang responden pertama daripada memohon pelepasan yang berjumlah kepada pembebasan (lihat perenggan 39–40).

(3) Tiada keperluan di bawah undang-undang yang mengenakan apa-apa kewajipan undang-undang ke atas responden pertama untuk memberi apa-apa alasan dalam membenarkan dan/atau menolak representasi yang dibuat oleh responden kedua. Tiada apa-apa di hadapan mahkamah untuk mencadangkan bahawa responden pertama telah mempertimbangkan secara tidak wajar representasi responden kedua. Pada pandangan mahkamah, tiada apa-apa dalam permohonan semasa bagi membentuk keterangan prima facie yang meyakinkan bahawa responden pertama telah bertindak bertentangan dengan arahan tersebut, atau pun mana-mana undang-undang, untuk mengatasi anggapan kuat keabsahan keputusan responden pertama yang disangkal tersebut (lihat perenggan 41–43).

(4) Atas sebab-sebab yang disebutkan di atas, mahkamah mendapati bahawa tiada keterangan jelas dalam afidavit pemohon yang menunjukkan bahawa keputusan tersebut dibuat secara tidak rasional atau tidak munasabah. Oleh itu, mahkamah berpuas hati bahawa ambang undang-undang yang diperlukan untuk mencabar keputusan yang disangkal tersebut gagal dipenuhi (lihat perenggan 44).]

Cases referred to

Kartini Farah bt Abdul Rahim & Anor v Polis Diraja Malaysia & Ors [2023] MLJU 2114, HC (refd)

Shashi Kumar a/l Shanmugam (Presiden Global Human Rights Federation (GHRF)) & Ors v Ketua Polis Negara, Polis Diraja Malaysia & Anor [2023] MLJU 2473, HC (refd)

Sivakumar a/l Sockalingam & Anor v Yang Berhormat Peguam Negara, Malaysia [2022] MLJU 2946, HC (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Kijal Resort Sdn Bhd v Pentadbir Tanah Kemaman & Anor [2016] 1 MLJ 544, FC (refd)

Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad [1987] 1 MLJ 383, SC (refd)

Minister of Labour, Malaysia v Sanjiv Oberoi & Anor [1990] 1 MLJ 112, SC (refd)

Muhibbah Engineering (M) Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] 4 MLJ 660; [2022] 1 LNS 1069, CA (refd)

Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor

Abdullah [2004] MLJU 760; [2004] 2 CLJ 777, FC (refd)
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC (refd)
PP v Syed Tahir bin Syed Mohamed (Criminal Case No BA-62JSK-8–01 of 2023) (unreported) (refd)
R v Chief Constable of the Kent County Constabulary and another, ex parte L (a minor); R v Director of Public Prosecutions, ex parte B (a minor) [1993] 1 All ER 756, QBD (refd)
Ramalingam Ravinthran v Attorney-General [2012] 2 SLR 49, CA (refd)
SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356; [2022] 3 MLRA 219, FC (refd)
Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLJ 209, FC (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50, PC (refd)
WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd [2012] 4 MLJ 296; [2012] MLRA 257, FC (refd)

Legislation referred to

Arms Act 1960
Criminal Procedure Code s 254, 254(1)
Federal Constitution art 145(3)
Firearms (Increased Penalties) Act 1971
Internal Security Act 1960 (repealed by the Security Offences (Special Measures) Act 2012) s 57(1)
Rules of Court 2012 O 53 r 3(1)
Sexual Offences Against Children Act 2017 ss 14(a), 18

Pavendeep Singh a/l Gurbachan Singh (Paven & Co) for the applicant.
Nur Irmawatie bt Daud (Attorney General's Chambers) for the respondent.

Shahnaz Sulaiman J:

[1] This application for leave to commence judicial review proceedings pursuant to O 53 r 3(1) of the Rules of Court 2012 pertains to the decision of the first respondent dated 21 September 2023. The first respondent on 21 September 2023 applied for a 'discharge amounting to an acquittal' of the second respondent in *Public Prosecutor v Syed Tahir bin Syed Mohamed* (Criminal Case No BA-62JSK-8–01 of 2023) (unreported) (the 'criminal case') pursuant to art 145(3) of the Federal Constitution ('the FC') and s 254 of the Criminal Procedure Code ('the CPC') ('the said impugned decision').

[2] The honourable Attorney General has objected to this application for leave to commence judicial review.

RELIEF SOUGHTS

[3] The applicant sought the following reliefs in this application as reproduced below:

(1) bahawa pemohon diberikan kebenaran untuk memohon suatu perintah certiorari untuk membawa ke mahkamah yang mulia ini bagi tujuan ia dibatalkan, dan untuk membatalkan, keputusan responden pertama pada 21.9.2023 untuk memohon suatu 'Pelepasan Yang Terjumlah Kepada Pembebasan' terhadap responden kedua dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed*;

(2) bahawa pemohon diberikan kebenaran untuk memohon suatu deklarasi bahawa keputusan responden pertama pada 21.9.2023 untuk memohon suatu 'Pelepasan Yang Terjumlah Kepada Pembebasan' terhadap responden kedua dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed*;

(3) bahawa pemohon diberikan kebenaran untuk memohon suatu deklarasi bahawa keputusan responden pertama pada 21.9.2023 untuk memohon suatu 'Pelepasan Yang Terjumlah Kepada Pembebasan' terhadap responden kedua dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed* adalah batal dan tidak sah dan/atau tidak munasabah dalam ertikata Wednesbury dan tercemar dengan tidak rasional;

(4) berikutan dengan permohonan-permohonan 1 hingga 3 di atas, bahawa pemohon diberikan kebenaran untuk memohon suatu perintah mandamus untuk mengarahkan responden pertama bertindak mengikut undang-undang dan, jika responden pertama menganggap sesuai dan wajar, untuk bertindak mengikut seksyen 254A Kanun Tatacara Jenayah dan mendakwa semula responden kedua dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed* dan memohon untuk menghidupkan semula kes tersebut;

Dan sebagai tambahan atau alternative kepada permohonan-permohonan (1) hingga (4) di atas:

(5) bahawa pemohon diberikan kebenaran untuk memohon suatu perintah mandamus untuk mengarahkan responden pertama untuk membekalkan pemohon dengan segala maklumat, dokumentasi, sebab, asas dan butir-butir yang mana responden pertama bergantung kepada dalam mencapai keputusan responden pertama pada 21.9.2023 untuk memohon suatu 'Pelepasan Yang Terjumlah Kepada Pembebasan' terhadap responden kedua dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed* termasuk (tetapi tidak terhad kepada), surat-surat representasi yang dikeluarkan kepada responden pertama oleh atau bagi pihak responden kedua;

(6) bahawa pemohon diberikan dan/atau dibenarkan akses kepada semua perkara dan/atau dokumen yang difailkan dengan mahkamah dan/atau berada dalam rekod mahkamah dalam No Kes: BA-62JSK-8–01/2023: *Pendakwa Raya lwn Syed Tahir bin Syed Mohamed* termasuk sebarang rakaman mahkamah, perintah dan penghakiman mahkamah;

(7) bahawa mahkamah yang mulia ini membenarkan relif selanjutnya dan/atau

yang lain dan/atau perintah-perintah yang dianggap sesuai dan adil; dan

(8) bahawa tiada perintah terhadap kos.

SALIENT FACTS

[4] The salient facts of the application for leave to commence judicial review are garnered from documents filed by parties.

[5] The applicant on 11 January 2014 married Sharifah Aisyah bt Syed Mohamed ('Aisyah') and they were blessed with two daughters namely S1 who was born on 14 April 2016 and S2 who was born on 22 June 2022.

[6] The applicant and Aisyah were divorce on 13 October 2022.

[7] On 8 December 2021, the applicant lodged a police report against the second respondent who is Aisyah's brother on allegations of sexual assault on S1.

[8] The second respondent lodged a police report on 11 December 2021, denying the applicant's allegation.

[9] On 2 June 2022, the second respondent was charged under s 14(a) of Sexual Offences Against Children Act 2017 at the session's court in Shah Alam.

[10] During the case management, on 21 September 2023 the deputy public prosecutor applied for an acquittal and discharged ('A&D') of the second respondent. The session's court judge granted and A&D in the criminal case against the second respondent.

TEST FOR GRANTING LEAVE

[11] The law of judicial review has been elucidated particularly to its purpose and extent in the Federal Court's decision in *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* [2022] 2 MLJ 356; [2022] 3 MLRA 219 where Her Ladyship Tengku Maimun Tuan Mat CJ stated:

> Judicial review is a core tenet of the rule of law which is inextricably linked to the notion of constitutional supremacy in a democratic form of Government. This was because a core feature of the rule of law is the doctrine of separation of powers, a corollary to which is the concept of check and balance. Judicial review — whether constitutional review or statutory review — is a fundamental aspect of check and balance and is the vehicle through which the judicial branch of Government can perform its constitutional function vis a vis the other branches of Government. The

judicial power of the Federation which includes judicial review (constitutional and statutory) is vested by constitutional design solely in the two High Courts. A

[12] Pertaining to the test in granting leave for judicial review, the Federal Court in *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] MLRA 257 held that the test for leave to commence judicial review are as follows: B

> [12] ... Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if *the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome*. A rider must be attached to the application though ie unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged. (Emphasis added.) C

[13] In *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224 His Lordship Visu Sinnadurai J at p 225 held as follows: D

> ... The court, in exercising its discretion that an *application for leave be granted must be convinced by the applicants that prima facie the application is genuine and that there is some substance in the grounds supporting the application*. The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. *Additionally, an application must fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial remedies is inappropriate*. (Emphasis added.) E F

[14] In summary, although the standard for granting permission is not stringent, an applicant wishing to obtain permission must meet the following requirements: G

(a) demonstrate that the application is not frivolous;

(b) prove that the application is not vexatious; and

(c) establish that it warrants further consideration during the substantive stage. H

[15] Founded on these principles, this court will consider this application to commence leave for judicial review.

OBJECTION BY THE ATTORNEY GENERAL I

[16] It was submitted by learned senior federal counsel that when the Attorney General appears at leave stage, the Attorney General appears not for the respondent, but in the capacity as Attorney General (see: *Kijal Resort Sdn*

Bhd v Pentadbir Tanah Kemaman & Anor [2016] 1 MLJ 544).

[17] Senior federal counsel submitted that the role of Attorney General at the leave stage is to assist the court in sieving out frivolous applications by appraising the court of any particular features of the case that would disqualify leave being granted.

[18] In this application for leave to commence judicial review proceedings, the applicant is seeking to challenge the public prosecutor's decision to apply for an acquittal and discharge of the second respondent in a criminal case against the second respondent.

[19] The Attorney General is objecting to this application for leave to commence judicial review proceedings on the grounds that the impugned decision is not amenable to judicial review.

[20] In support of this argument, learned senior federal counsel submitted that post the Federal Court decision in *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLJ 209, the exercise of the Attorney General/public prosecutor's discretion under art 145(3) of the Federal Constitution is susceptible to judicial review, but only in the narrowest circumstances and subject to a higher and move stringent threshold of scrutiny.

[21] In coming to this position, the Federal Court had considered the cases of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 and *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383.

[22] In *Teh Cheng Poh*, the Privy Council reviewed whether the public prosecutor had lawfully exercised discretion in prosecuting an offence under sub-s 57(1) of the Internal Security Act 1960 ('the ISA'). Lord Diplock ruled that the public prosecutor had the authority to choose among the ISA, the Arms Act 1960, and the Firearms (Increased Penalties) Act 1971 for prosecution. As no evidence suggested misuse of this discretion, the charge against the appellant was upheld.

[23] In *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 the Singapore Court of Appeal's stated:

> [24] ... *Relevant factors for the prosecution's consideration in making prosecutorial decisions include the available evidence, public interest considerations, the personal circumstances of the offender, the offender's degree of culpability, etc*. Where these factors apply differently to different offenders, this would justify differential treatment between them. The only qualifications stated in *Teh Cheng Poh* are that

there must be no bias on the prosecution's part and irrelevant considerations must not be taken into account.

[25] In applying the aforesaid criteria to the facts of *Teh Cheng Poh*, the Privy Council observed (at 56) that 'there [was] no material on which to found an argument that in the instant case [the Malaysian AttorneyGeneral] exercised [the prosecutorial discretion] unlawfully'. *In other words, the Privy Council stated that a mere allegation that the Malaysian Attorney-General had exercised his prosecutorial power unlawfully, unsupported by evidence, could not engage art 8(1) of the Malaysian Constitution*. Although the actual outcome in *Teh Cheng Poh* was ultimately based on other grounds, it was implicit in this finding that *if the appellant had somehow been able to produce evidence that the Attorney-General of Malaysia had not given unbiased consideration to his case or had taken into account irrelevant considerations in deciding to charge him with a capital offence, art 8(1) of the Malaysian Constitution would have been infringed*.

[26] Hence, *Teh Cheng Poh* stands for the principle that (in our local context) the Attorney-General may not exercise his prosecutorial power under art 35(8) of the Constitution in breach of art 12(1) (or, for that matter, in breach of any other fundamental liberty set out in Pt IV of the Constitution) — but, *if the offender alleges such a breach has occurred in his case, the burden lies on him to produce evidence of the alleged breach* ...

[27] *That the burden of proof lies on the offender in this regard is a wholly trite proposition that is reflected in s 103(1) of the Evidence Act*, which states that '[w]hoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'. In constitutional challenges to the prosecutorial discretion based on an alleged breach of one or more of the fundamental liberties enshrined in the Constitution, *it is only when enough evidence is adduced to show a prima facie breach that the evidential burden will be shifted to the Attorney-General to justify his prosecutorial decision*. (Emphasis added.)

[24] In *Teh Cheng Poh* and *Ramalingam*, it was established that any challenge to the public prosecutor's exercise of discretion requires evidence that the discretion was exercised unlawfully. In the landmark *Sundra Rajoo*'s case, the Federal Court, led by the Chief Justice, considered this principle, emphasising that it should align with traditional grounds for judicial review as defined in *Council of Civil Service Unions*. The court further underscored that the public prosecutor must exercise discretion in good faith, professionally, lawfully, and with regard to public interest, as reinforced in *Lim Kit Siang*.

[25] Drawing from these principles, the Federal Court concluded that the public prosecutor's discretion under art 145(3) cannot be unrestricted, as that would undermine the rule of law. However, making it entirely open to judicial review with a low threshold for leave could breach the separation of powers and harm public interest. To maintain a balance among these interrelated factors, a two-step threshold test was established. In this regard, the Federal Court in

Sundra Rajoo held as follows:

> [96] *The AG/PP by constitutional design has access to the police, investigation papers and other core decisive material which ultimately factor into his decision to charge or not to charge a person or to otherwise discontinue proceedings. The AG/PP is the guardian of public interest and so he factors not just the law and legal principles but also matters relevant to public policy and national security*. The courts, also by constitutional design, do not have the same benefit. Such design is inherent in the mechanism of our adversarial system which is grounded or rooted in the doctrine of separation of powers. *Some degree of judicial deference to executive discretion of the AG/PP is necessary so as not to stymie our justice system*.
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> [97] Deference does not however translate to complete surrender. *Ours is a system built on constitutional supremacy where accountability, separation of powers and rule of law take centre stage*. Much headway has been made in our constitutional jurisprudence to curate the fine balance between policy considerations on the one side, and the adjudication and supervision of the legality of State action by the judicial branch — on the other. This gradual shift from unfettered discretion to restricted supervision is apparent from the judgment of this court in *Peguam Negara Malaysia v Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; ; [2019] 3 MLJ 443 ('Chin Chee Kow').
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> ...
>
> [109] That said, we accept that *at stake in all review cases is the notion that the courts must be cautious not to run awry of the fine dividing line of the doctrine of separation of powers. In this regard, while the AG/PP's powers are reviewable, the AG/PP's discretion under art 145(3) of the FC, as a matter of policy, remains subject to a higher threshold of scrutiny* .... (Emphasis added.)

[26] The Federal Court in *Sundra Rajoo* emphasised the public prosecutor's discretion under art 145(3) is cloaked with a strong presumption of legality. Pertaining to this, the Federal Court held as follows:

> [113] In all challenges against the decisions of the AG/PP exercising his powers under art 145(3) of the FC, the position is that his decisions are *cloaked with the presumption of legality*. The *onerous burden lies on the challenging party to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG/PP's decision within the recognised reasons for judicial review*. (Emphasis added.)

[27] The Federal Court then developed a two-step threshold test that must be met at the leave stage for any application challenging the strong presumption of legality in the public prosecutor's discretion under art 145(3) as reproduced below:

> [114] Based on the foregoing authorities, it can be surmised that any challenge must therefore pass a two-step threshold which must be *satisfied at the leave stage of any application for judicial review*.

[115] *Firstly, the burden of proof lies on the applicant*. The applicant will have to show that he has a legal basis to challenge the decision of the AG/PP. This refers to the traditional grounds of judicial review and other bases implicitly recognised by the earlier judgments on this subject, including but not limited to:

(i) illegality;

(ii) procedural impropriety (eg, breach of the rules of natural justice);

(iii) irrationality (considering irrelevant considerations or ignoring relevant and material considerations); and

(iv) mala fides.

[116] Once the above legal grounds or any of them are clearly set out, *the applicant will then have to adduce compelling and prima facie proof that the decision or omission of the AG/PP falls within those grounds or any one of them*. In other words, the *courts are to presume, having regard to the doctrine of separation of powers, that all or any of the grounds were not made out unless the evidence singularly leads to the inevitable conclusion that they have been made. It is only after that threshold is crossed that the AG/PP bears the burden to justify his actions or inactions to the court* …

[117] Needless to say, the assessment of the law and the facts will depend on the unique circumstances of each and every case. We state again at the risk of repetition that the assessment in each and every case must be made having regard to the doctrine of separation of powers. (Emphasis added.)

[28] The two-step threshold test requires applicants to demonstrate, at the leave stage, that:

(a) they have a legal basis to challenge the Attorney General/public prosecutor's decision, grounded in traditional judicial review principles or precedents; and

(b) they can present compelling, prima facie evidence that the decision or omission falls within these grounds, leading to an inevitable conclusion that the challenge is justified.

[29] In *Sundra Rajoo*, the Federal Court affirmed that, while the public prosecutor's powers under art 145(3) are subject to judicial review, any challenge must be backed by clear, compelling evidence that strongly supports overturning the presumption of legality.

[30] At the leave stage, the applicant must provide compelling, prima facie evidence but is not required to conclusively prove that the decision was illegal, procedurally improper, irrational, or made in bad faith. This distinction aligns with the two-stage nature of judicial review, where the court only needs to assess if the applicant has an arguable case at this initial stage. This has been recently affirmed by the Court of Appeal in *Muhibbah Engineering (M) Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] 4 MLJ 660; [2022] 1 LNS 1069

which determined that:

> [25] With respect, we are unable to agree with the contention of the respondent that the court hearing the JR should determine at the leave stage itself whether this is an exceptional case for judicial intervention when the alternative remedy had not been exhausted. To our minds, an important issue of law has been raised as to the correctness of the respondent's to decision impose the penalty in question on the appellant and as to whether this is an exceptional case amenable to JR and this is a question that should properly be addressed and decided at the substantive stage on merits. *Contrary to the respondent's contention, we are in agreement with the appellant that its case as presented is patently an arguable case that should succeed at least at the leave stage. We are inclined to allow the appellant to proceed to the substantive stage to ventilate the issues of law raised for serious consideration and not to be shut out at the preliminary stage*. (Emphasis added.)

[31] Therefore, the only issue is whether there is compelling prima facie evidence at present to allow encl 1 to be heard at the substantive stage.

[32] The senior federal counsel submitted that the principles in *Sundra Rajoo* have been applied in the following cases where the public prosecutor's prosecutorial discretion was challenged. The High Court, in each of these cases had refused leave due to the absence of compelling prima facie evidence to support the applicants' allegations, and thereafter their failure to satisfy the two-step threshold test. These authorities are:

(a) *Sivakumar a/l Sockalingam & Anor v Yang Berhormat Peguam Negara, Malaysia* [2022] MLJU 2946:

> [32] ... (d) In short, the law presumes that the AG acts legally.
>
> (e) The *onerous burden lies on the applicants to overcome the strong presumption of legality with compelling prima facie evidence of grounds to review the AG's decision within the recognised reasons for judicial review*.
>
> (f) The applicants must come to court with more than police reports or exhibits of social media postings to overcome the strong presumption of legality. Police reports and social media postings, without more, are not compelling and convincing evidence to rebut the presumption of legality.
>
> (g) *One instance that the applicants can rebut the presumption is if they can show the elements of mala fide on the part of the AG qua Public Prosecutor when he exercised that discretionary power under art 145(3)*.
>
> (h) *The applicants have failed to show any mala fide on the part of the AG qua public prosecutor to justify to this court to review the exercise of his discretionary power*.
>
> (i) Unlike an ordinary application for leave of judicial review, an application of this nature requires a higher threshold. *The applicants have failed to cross this hurdle*. (Emphasis added.)

(b) *Shashi Kumar a/l Shanmugam (Presiden Global Human Rights Federation (GHRF)) & Ors v Ketua Polis Negara, Polis Diraja Malaysia & Anor* [2023] MLJU 2473 :

> [49] The applicants must provide more than police reports and excerpts of speeches to challenge the strong presumption of legality. Police reports and edited videos uploaded on social media, without more, do not constitute compelling prima facie or convincing evidence to rebut the presumption of legality.
>
> [50] *Another way to rebut the presumption of the legality of the AG/PP in exercising his discretion under art 145(3) of the FC is to demonstrate that the AG/PP acted with mala when making such a decision. However, the applicants have also failed to show that the AG/PP made the decision with mala fide*.
>
> [51] As this nature of application requires a higher standard of review, it is my view that the *applicants have failed to cross the high threshold*. (Emphasis added.)

(c) *Kartini Farah bt Abdul Rahim & Anor v Polis Diraja Malaysia & Ors* [2023] MLJU 2114 :

> [57] The decision of the AG is cloaked with the presumption of legality. Hence, the burden lies on the applicants to overcome this presumption. The applicants must overcome this presumption with a compelling prima facie evidence of the grounds of judicial review that they relied on to review the AG's decision.
>
> [58] Therefore, the applicants must provide evidence beyond a screenshot of a group telegram, google drive consisting of the tortured baby monkeys' videos, a police report, and a BBC's article to overcome this presumption.
>
> [59] It is in this court's view that the applicants have failed to provide a compelling prima facie evidence to prove their ground in challenging the decision of AG. Consequently, the applicants have failed to rebut the presumption of the legality of the AG in exercising his power.
>
> [60] Another ground to rebut the presumption of the legality of the AG in exercising his discretion under art 145(3) of the FC is by showing that there is mala fide on the part of the AG when making the decision. However, the applicants also failed to show that the AG had made the decision with mala fide.
>
> [61] As this nature of the application requires a higher standard of review, it is my view that the applicants have failed to pass this hurdle.

[33] The applicant in this application for leave to commence judicial review argued that:

(a) the first respondent had acted ultra vires art 145(3) of the Federal Constitution and s 254 of the Criminal Procedure Code;

(b) the first respondent had acted ultra vires his jurisdiction and/or powers since the impugned decision is unreasonable in the *Wednesbury* sense and tainted with irrationality;

(c) the impugned decision is irrational and/or unreasonable in the *Wednesbury* sense, the Attorney General/public prosecutor has opted to charge second respondent at the first instance;

(d) the first respondent had acted ultra vires his jurisdiction and/or powers and in contravention of public interest, due to the fact that substantial amount of time and judicial resources have been exhausted;

(e) the first respondent had acted ultra vires his jurisdiction and/or powers and in the absence of any relevant considerations and/or material to justify the impugned decision;

(f) the first respondent had acted ultra vires his jurisdiction and/or powers and took into account irrelevant considerations towards the written representations issued by second respondent;

(g) the first respondent had acted ultra vires his jurisdiction and/or powers since the impugned decision was made based on the second respondent's written representations;

(h) the first respondent had acted ultra vires his jurisdiction and/or powers by applying for A&D against second respondent, it will stop any possibility of second respondent be re-charged and prosecuted again;

(i) the first respondent had acted ultra vires his jurisdiction and/or powers as the applicant's has been denied for right to be heard prior to the impugned decision been made;

(j) the first respondent had acted ultra vires his jurisdiction and/or powers since the impugned decision contravened the 'public prosecutor's Direction No 2/2019 Directive Pertaining to Discontinuance And Withdrawal of Proceedings, Reduction of Charges and Entering Nolle Prosequi' dated 3 May 2019; and

(k) the first respondent had failed to provide the applicant with sufficient basis, reason or particulars to support the making of the impugned decision since he is the complainant in the criminal case and the first respondent has endangered the safety of children by taking into consideration of one side's position only.

[34] It was also submitted that the court when dealing with a charge under the Sexual Offences Against Children Act 2017 (the 'Act') can convict on the uncorroborated evidence of a child. Section 18 of the provides:

18 Evidence of child witness

Notwithstanding anything contrary in any other written law, *in any proceedings against any person relating to any offence under this Act*, or any offence specified in the Schedule where the victim is a child, *the court may convict such person of such offence on the basis of the uncorroborated evidence of a child, given upon oath or otherwise*. (Emphasis added.)

[35] It was submitted by the applicant that the applicant's position is relatively strong. While it's up to the trial judge in the criminal case to decide if the elements of the charge under s 14(a) of the Act are met, the applicant has presented an arguable case. This justifies further examination at the substantive stage to determine if the decision may involve illegality, procedural impropriety, irrationality, or bad faith.

ANALYSIS

[36] In this application, it was argued that the applicant failed to provide cogent, concrete, and compelling prima facie evidence to support any grounds for judicial review regarding the Attorney General/public prosecutor's decision, thus failing to overcome the strong presumption of legality. The claims do not satisfy the two-step threshold test necessary to justify granting leave for judicial review, as they lack substantiating evidence. Further elaboration on these points is provided in subsequent submissions.

[37] The first respondent's discretion in his prosecutorial decisions are provided for in art 145(3) of the Federal Constitution reads:

145 Attorney General

...

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or *discontinue any proceedings* for an offence, other than proceedings before a Syariah court, a native court or a court-martial. (Emphasis added.)

[38] The same power is provided for in sub-s 254(1) of the Criminal Procedure Code, and it reads as follows:

254 Public Prosecutor may decline to prosecute further at any stage

(1) *At any stage of any trial, before the delivery of judgment*, the Public Prosecutor may, if he thinks fit, *inform the Court that he will not further prosecute the accused* upon the charge and thereupon *all proceedings on the charge against the accused shall be stayed and the accused shall be discharged of and from the same*. (Emphasis added.)

[39] The fact that the second respondent was charged in the sessions court does not prevent the first respondent (the Attorney General/public prosecutor) from exercising prosecutorial discretion, as sub-s 254(1) of the Criminal

Procedure Code allows discontinuation of proceedings (*nolle prosequi*) at any stage before judgment. Since judgment was not yet delivered, the first respondent was within his discretion to seek an A&D. Although the applicant argued that the first respondent exceeded his powers, they did not specify how or provide compelling prima facie evidence to support this claim. Additionally, the applicant argued that the impugned decision violated public prosecutor's Direction No 2/2019.

[40] The applicant's argument is unfounded and lacks merit. Firstly, the direction does not categorically prevent the first respondent from applying for an A&D.

[41] There is no requirement under the law which impose any legal duty on the first respondent to give any reason in allowing and/or rejecting the representation made by second respondent (see: *Nordin Hj Zakaria (Timbalan Ketua Polis Kelantan) & Anor v Mohd Noor Abdullah* [2004] MLJU 760; [2004] 2 CLJ 777; *Minister of Labour, Malaysia v Sanjiv Oberoi & Anor* [1990] 1 MLJ 112 and *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72).

[42] In the considered view of this court, there is nothing in the application to form a compelling prima facie evidence that the first respondent had acted in contravention of the direction, or any law for that matter, so as to overcome the strong presumption of legality in his making of the impugned decision.

[43] The applicant claims that the first respondent improperly considered the second respondent's written representations after deciding to charge the second respondent in court, assuming there was a preliminary case against them. The applicant argues that these representations should not have been considered. However, to proceed with judicial review, the applicant must provide strong, initial evidence to meet the high threshold required at this stage, especially given the deference to the public prosecutor's discretion in such matters (see: *R v Chief Constable of the Kent County Constabulary and another, ex parte L (a minor); R v Director of Public Prosecutions, ex parte B (a minor)* [1993] 1 All ER 756). Before this court, there is nothing to suggest that the first respondent had improperly considered the second respondent's representation.

CONCLUSION

[44] For the aforementioned reasons, this court finds that there is no clear evidence in the applicant's affidavit showing that the decision was made irrationally or unreasonably. Therefore, this court is satisfied the necessary legal threshold to challenge the impugned decision has not been met. Consequently,

this court dismisses this application to commence judicial review. No order is made as to costs.

Application to commence judicial review dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar